FILED
MAR 1 1 1956
HAROLD B. WILLEY, Cl

No. 589

IN THE

Supreme Court of the United States

October Term, 1955

V. P. SERODINO, INC.,
Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL.

On Appeal From The United States District Court For The Southern District of Ohio, Western Division.

PETITION FOR REHEARING.

ROBERT N. BURCHMORE,
Attorney for Appellant.

2106 Field Building,
Chicago 3, Illinois.

McCORMICK AND HENDERSON, INC., CHICAGO

No. 589

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1955

V. P. SERODINO, INC.,
Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL.

On Appeal From the United States District Court For The Southern District of Ohio, Western Division.

PETITION FOR REHEARING.

Serodino petitions for rehearing on the ground that the judgment would unjustly reward fraudulent representations by the appellees, and on the ground that the decision needs full explication because it appears to conflict with common public knowledge.

The government and interveners have used distortion, confusion and elaborate evasions which cannot be fully exposed without the clear illumination of oral argument. We therefore pray that the Court will stay its order summarily affirming [illegible] motion, set the case for argument (as recommended by Mr. Justice Black and Mr. Justice Douglas, and in accordance with the policy of Rule 45), and upon final judgment render an opinion for the instruction of the public.

I.

The assailed order of the Interstate Commerce Commission would require appellant to stop hauling scrap iron in barges on the rivers without a certificate. Appellant stands upon section 303(b) of the Interstate Commerce Act,[1] which provides that nothing in the statute shall apply to bulk transportation by water under stated conditions.

It is common knowledge that scrap always is, and as a practical matter can only be transported in bulk. The truth is that Serodino transports scrap in bulk, as has been the invariable custom in the trade from time immemorial. That being so, and the government having conceded that all the stated conditions of exemption were met, the exemption should attach and the commission's order should be held invalid.

The government and the regulated carriers would smother the simple truth and evade the exemption. In order to manufacture a foundation for the order, they have therefore resorted to an assortment of confusing and contradictory distractions, and have concocted the prettiest mess of gobbledegook ever to issue from the halls of officialdom. Stripped of verbiage, the main proposition of interveners is that "bulk" really means "fungible" or "homogeneous". That is too hard for the government to swallow, so it offers the falsehood, expertly disguised in irrelevancies, that scrap cannot possibly be in bulk because "it is not and cannot be 'heaped loose' into the holds of the transporting barges".

---

[1] 49 U.S.C. 903(b) "Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count. For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. This subsection shall not apply to transportation subject, at the time this part takes effect to the provisions of the Intercoastal Shipping Act, 1933, as amended."

Ordinarily, these inventions would fool no one. But the respect due and accorded to the commission and the solicitor general forbid the short shrift which the ideas themselves deserve. Unfortunately, an undertaking to furnish a reasoned disposition of the whole variety of arguments and full pretenses is likely to lend a superficial appearance of substance to the government propositions. Therefore, the process necessitates a full day in court.

II.

Interveners pretend that the proposition that "bulk" means "fungible" represents a long standing administrative construction of the statute. They provide window dressing for this idea in the form of a long list of commission reports that are supposed to instruct us on what is or is not in bulk, including scrap. But on reading, these cases turn out to have been mostly decided under a different section of the law.[2] At any rate, none of them remotely supports the substitution of "fungible" for "bulk" upon which appellees must rest this case.

Repeated references to industry custom and to supposed acceptance of the commission's views constitute mere pretense. The truth is that the invariable industry custom has been to haul scrap in bulk—it is only that the regulated carriers do not need to haul it exempt and therefore don't bother meeting the conditions necessary to exemption of bulk movement.

---

[2] 49 U.S.C. 903(e)(2), unlike 903(b) gives the commission power to say what shall be exempt thereunder: "It is hereby declared to be the policy of Congress to exclude from the provisions of this part, in addition to the transportation otherwise excluded under this section, transportation by contract carriers by water which, by reason of the inherent nature of the commodities transported, their requirement of special equipment or their shipment in bulk, is not actually and substantially competitive with transportation by any common carrier subject to this part or part I or part II. Upon application of a carrier, made in such manner and form as the Commission may by regulations prescribe, the Commission shall, subject to such reasonable conditions and limitations as the Commission may prescribe, by order exempt from the provisions of this part such of the transportation engaged in by such carrier as it finds necessary to carry out the policy above declared. * * *"

The interveners would have the Court believe that only Serodino refuses to conform; they even go to the extreme of belittling Serodino's case on the ground that parties who were on his side before the commission did not enter formal appearances in court. If such circumstances were relevant, we would testify that all Serodino's supporters are backing this appeal. We could also point to bills in Congress by which the regulated carriers have unsuccessfully sought repeal of the entire bulk exemption of section 303(b). Having failed in Congress they gain partial repeal here by the fiat of a sympathetic commission.

The commission's report writer, relying solely upon a resourceful and lively imaginative, suggested that the words of the statute have a sort of special commercial meaning which must govern. This is too patently false for appellees to pursue. It is, therefore, abandoned by them in court, leaving a most confusing question as to just where they do stand.

The words "in bulk" are not words of art, nor does acceptance of their common import produce an absurd or futile result. The words used are clear and unambiguous and forbid any resort to legislative history, administrative interpretation or other devices. The broad regulatory scheme is satisfied only by honoring the exemption as written and not by allowing the commission to re-write it. And most important, the commission was not acting in an area of expertise; it was squarely disobedient to an unqualified command of Congress, in a context that shows that the Congress knows how to be explicit when it means to allow some agency discretion.[3]

III.

The government poses the extreme proposition that scrap cannot, by its very nature, be in bulk. They stand on the monstrous statement that scrap "cannot be heaped

[3] Compare paragraphs (b) and (e) of sections 303 as quoted in footnotes above.

loose", although the commission's report reluctantly admitted that a bargeload of scrap borings would be in bulk. There is a confusion of thought here that is not designed; it is rather an inevitable result of attempting to deny the truth.

The government proposition that scrap cannot be in bulk even in the ordinary sense is a naked falsehood. But the government would enthrone it by deception and by a most elaborate recital of irrelevant facts. In one place the government states that most scrap is in bundles (compressed masses); that it is not only immaterial, it is untrue. Elsewhere the talk is about locomotive wheels and other interesting things that may be found by pawing over a scrap heap. The real stuffing, though, is the solemn discussion about the preparation of scrap, its uses, price data, grading, the size of the industry, and typical barge tows of the regulated carriers. All of this has absolutely nothing to do with bulk handling and appellees know it. All of the same tripe could be served up in connection with grain, ore, sulphur, coal or any other material of which the exemption is not even questioned. Appellees merely create a smoke screen to hide the truth.

IV.

An incalculable portion of the public (including certainly all the parties on both sides of this case, as well as everyone having knowledge of or connection with the transportation industry, the steel industry or the scrap trade) knows that scrap is always in bulk and cannot practically be handled otherwise. This is not a matter of opinion, like segregation or civil rights; it is a matter of common knowledge according to the everyday sense of the statutory language to which this Court usually requires adherence except for good cause. Therefore, when the Court affirms a decision that scrap cannot be transported in bulk, a paradox results for which some explanation is needed. To merely refer the people to the artificial commission report is to invite the ridicule which that report deserves from a discerning public.

CONCLUSION.

This petition does not document the assertions made in it. Our previous treatment of appellees arguments as if they were genuine seems merely to have played into the hands of confusion and deception. Similarly, we suggest, any request for replies hereto will produce only denials and more evasions.

We respectfully submit that truth and understanding can be insured only by having both sides stand up and spell out their propositions subject to the searching scrutiny of the Court. We pray that the Court will hear argument either on this petition or on the merits.

Respectfully submitted,

ROBERT N. BURCHMORE,
Attorney.

March, 1956.

End